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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1033 95

HUMBLE OIL & REFINING COMPANY, ET AL.,
Petitioners,

VS.

W. C. TURNBOW, ET AL.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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INDEX

SUBJECT INDEX

INDEX OF AUTHORITIES

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

I.

ADDITIONAL STATEMENT

In view of the insistence of respondents that the Railroad Commission order complained of was supported by substantial evidence before it and their further statement that petitioners do not contend the contrary, and do not attack the "fact findings" made by the Court of Civil Appeals in the instant case, we

submit the following Additional Statement, supplementing those on pages 2-5, 10-13 and 15-21 of the Petition for Writ of Certiorari.

Respondents' Brief, pages 2 and 3, refers to the transcripts of hearings before the Railroad Commission held June 24, 1937, and September 23, 1937 (R. 239-278, 308-343), as containing the testimony referred to and discussed by the Court of Civil Appeals in its opinion, said by that court to support the finding made by the Commission as the basis for its order, that the wells are necessary to prevent waste. (R. 348)

Examination of the transcripts of those hearings shows the only testimony that the wells will prevent waste is the opinion testimony of Turnbow's witnesses Hudnall and Griffin, which is summarized for the Court's convenience on pages 20 to 21 of the Petition for Writ of Certiorari. The basis of their opinion that the wells are necessary to prevent waste is clearly shown by the following excerpt from Griffin's testimony on cross-examination:

> "Q. It is your opinion that it doesn't make any difference how far apart wells are?
> "A. I think the closer together they are the less waste there will be.
> "Q. You think there is no reason for keeping wells spaced widely apart?
> "A. I certainly do not.
> "Q. The closer you drill them, in your opinion, the more oil you will get?
> "A. That is right.
> "Q. You apply that opinion just to this area of the East Texas field?
> "(fol. 867) A. To the entire field.

"Q. The more wells you drill anywhere in the field the more oil you will get?
"A. That is correct." (R. 322)

Testimony of this character is an expression of what is commonly known as the "more wells, more oil" theory. Petitioners duly objected to such opinion testimony at the hearings before the Commission. (R. 251, 252, 312-13, 339-40)

Petitioners' Original Petition in the trial court summarizes in paragraph 8 (R. 15-17) the testimony adduced at said hearings held before the Commission June 24, 1937, and September 23, 1937, respectively. It alleges Turnbow offered testimony by a petroleum geologist at the hearing on June 24, 1937,

> ". . . who admitted that the . . . 41 acre portion of the McGrede tract (disregarding the subdivision of the 2½ acres therefrom) is fully and reasonably protected from drainage by other producing wells thereon, without the drilling or production of either or both of the well locations complained of; that the operation of the two well locations sought by Turnbow would enable him to drain approximately 149,000 barrels of oil from the adjoining leases, including Plaintiff's lease; that in order to lessen such drainage, nine additional wells will be required as offsets on adjacent leases, two of which will be required on Plaintiff's lease; **and while applicants' said witness expressed his private opinion (over objection of this Plaintiff) that the operation of the two locations in controversy would increase the recovery of oil from the field and thereby prevent waste, he admitted that his said opinion was based on the theory that the more wells drilled, the greater will be (fol. 29) the recovery, and on his private**

opinion that there should be no restriction on the number of wells drilled and that the conditions existing in the reservoir at this locality pertaining to the migratory ability of the oil and gas in the sand are not different from the conditions prevailing generally in said field . . ." (R. 15, emphasis ours.)

The petition alleges that Turnbow offered testimony by a petroleum engineer at the hearing on September 23, 1937 (being the only additional testimony offered by him), which engineer

". . . admitted that the . . . 41 acre portion of the McGrede tract (disregarding the subdivision of the 2½ acres therefrom) was then fully and reasonably protected from drainage by other producing wells thereon, (fol. 30) without the drilling or production of either or both of the well locations complained of, and that the operation of said two well locations would enable Defendants Turnbow and W. C. Turnbow Petroleum Corporation to drain large quantities of oil from adjoining leases, including Plaintiff's lease, to lessen which drainage it would be necessary for adjacent lessees to drill a total of seven additional wells as offsets to the well locations in controversy, one of which would be required on Plaintiff's lease; **and while applicants' said witness expressed his private opinion (over objection of this Plaintiff) that the operation of the two locations in controversy would increase the recovery of oil from the field, and thereby prevent waste, he admitted his said opinion was based on the theory that the more wells drilled, the greater would be the ultimate recovery, and not on the existence of any peculiar local conditions in the reservoir in this area, limiting the usual migra-**

tory ability of the oil and gas in the sand, different from such conditions existing generally in the field . . . ." (R. 16-17, emphasis ours.)

Of the order granting permit, paragraph 9 of the petition alleges:

". . . **said order was arbitrarily entered in that there was no evidence whatsoever, and no substantial evidence, introduced at the aforesaid hearing or hearings,** showing or tending to show that the granting of said permit is necessary for the purpose of preventing the confiscation of property or for the purpose of preventing waste of oil and gas within the meaning of the rule applicable to said field . . . " (R. 17, emphasis ours)

Paragraph 10 of the petition attacks the order granting permit as unreasonable, discriminatory and unjust in fact in its operation against plaintiff:

"(f) Because, as shown by the undisputed evidence introduced at said hearing, the drilling of the two wells at the locations specified in the permit herein complained of will enable the owners of mineral interests in said 2½ acres to drain oil in vast quantities from the neighboring leases owned and operated by Plaintiff, which oil said parties have no vested right to be permitted to produce and appropriate, and Plaintiff cannot protect itself against this drainage for the reasons herein more fully shown." (R. 19-20)

* * * *

"(h) There was no evidence offered by applicants before the Railroad Commission showing that the granting of permit to drill and operate the wells in controversy, or either of them is necessary to

prevent waste of oil and gas within the meaning of amended Rule 37, **the opinion of applicants' witnesses** expressed at said hearings **being merely an opinion that the rule under which said exceptions were being sought is an unwise rule, and said testimony was therefore improper and cannot be the basis for granting an exception to said rule,** and was duly objected to by Plaintiff on such ground, and because in fact the operation of the wells in controversy or either of them, will cause a waste of oil and gas within the meaning of said amended Rule 37 for the reasons herein related." (R. 20, emphasis ours)

* * * *

Following the above mentioned allegations in the petition is sub-paragraph (j) of paragraph 10, quoted on pages 10-12 of the Petition for Writ of Certiorari, which is in substance that even if the Commission were entitled to consider the testimony expounding the "more wells, more oil" theory as a basis for granting wells spaced in violation of the rule, nevertheless it had no right to place Turnbow in a position of advantage which would enable him to drain large quantities of petitioners' oil under the guise of conserving oil and gas; that it is the Commission's duty to distribute equitably both the wells and allowable production in such manner as will not give Turnbow an advantage over the adjoining lessees, and the Commission, if authorized to grant the permit, at the same time should have adjusted the allowable production so that the drilling of the two additional wells on the original McGrede 41 acre tract would not increase its allowable, and the granting of the permit without such a provision for petitioners' protection is arbitrary, unreasonable, unjust and discriminatory;

that without such a provision the granting of the two wells in controversy will enable Turnbow to drain and appropriate large quantities of oil from petitioners' lease which petitioners' wells would otherwise produce, and that such an adjustment would have lessened this injury; that under such circumstances the granting of the permit without such a provision is discriminatory and confiscatory, violating petitioners' rights under the 14th amendment. (R. 21-22)

Portions of the petition directed to the point that the subdivisions of the 2½ acres from the 41 acres after adoption of the spacing rule must be disregarded, and when so considered the wells in controvesy were not necessary under the exception "to prevent a confiscation of property," because the 41 acres was fully protected from drainage by wells on adjacent tracts as shown by undisputed evidence before the Commission, are omitted here because the Court of Civil Appeals recognized that the subdivision must be disregarded (133 S. W. (2d) 191, 192; R. 356) and sustained the permit on the sole ground that there was substantial evidence before the Commission that the wells are necessary to prevent waste (R. 356-8).

The Court of Civil Appeals did not file findings of fact, although petitioners requested it to do so (R. 358-364, 365, 353-7; 133 S. W. (2d) 191). It is apparent from a reading of its opinion that the holding that there was substantial evidence before the Commission was a conclusion of law and not a finding of fact.

Respondents are wholly incorrect in stating on page 3 of their brief that the Petition for Writ of Certiorari does not assail the holding of the Court

of Civil Appeals that there was substantial evidence before the Commission. Such holding is expressly attacked in Specification of Error No. 3 (Petition for Writ of Certiorari, pp. 22-3). See also, under "Reasons for Allowance of the Writ," argument and citation of authorities to the effect that testimony of this character has been repeatedly held to be improper and inadmissible (Petition for Writ of Certiorari, pp. 24-26); and the further argument that petitioners should not be deprived of an adjudication of the Federal questions presented merely because the Court of Civil Appeals upheld the permit order on the basis of opinion testimony before the Commission, it being there stated "the holding of the Court of Civil Appeals that testimony attacking the wisdom of the rule is substantial evidence of the right to an exception under the rule is without fair or substantial support in logic or reason." (Petition for Writ of Certiorari, p. 27).

SUMMARY OF ARGUMENT

1. The testimony held by the Court of Civil Appeals to be substantial evidence and upon which respondents rely to support the order granting permit, amounts to an attack on the wisdom of the rule itself, in a proceeding under the rule for an exception; for said testimony was admittedly based on the theory that observance of the minimum spacing provisions of the rule will always cause waste, and violation of those provisions will always prevent waste, and that all wells applied for should be granted as exceptions, thus making the exception become the rule itself. The Commission's sole authority for adopting and enforcing the spacing rule is on the theory that it is

necessary to prevent waste, and the Commission expressly found it to be necessary for such purpose in adopting the rule after having heard the divergent theories on well spacing, and continues to keep said rule in effect and undertakes to enforce it as to others. Numerous decisions of Texas courts hold testimony of the character relied on by respondents in this case is unsubstantial and incompetent to uphold a permit. The provision for granting exceptions to the spacing rule, adopted for general application in the field, implies that exceptional reservoir conditions must exist in order to justify granting of a permit under the exception "where necessary to prevent waste," but it is undisputed that the reservoir conditions around the Turnbow tract are not exceptional but equal or surpass average field conditions. To hold that the Commission may grant exceptions on testimony predicated on the theory that its spacing rule is unwise would subject operators in the field to the unbridled will of the administrative body and permit the Commission to rule the field by administrative fiat. Petitioners seek to prevent the Commission from arbitrarily disregarding, in favor of Turnbow, the standards which the Commission itself set up, and which the Commission at the same time asserts the right to enforce against other similarly situated.

2. It is settled by numerous prior decisions of this court that where the Supreme Court of Texas refuses a Petition for Writ of Error, the petition to this court for a Writ of Certiorari should be directed to the Texas Court of Civil Appeals. The order refusing the Application for Writ of Error does not appear on the face of the record to be a judgment

of the Supreme Court of Texas on the merits. The Court of Civil Appeals has the record, and for that reason, the petition to this court properly requests that Writ of Certiorari be directed to that court. Under the State law, an order of the Supreme Court of Texas refusing Writ of Error is not a judgment disposing of the case on its merits.

ARGUMENT

I.

The testimony offered at the hearing before the Commission on the application for an exception to the spacing rule, to the effect that the more wells you drill and the closer they are spaced anywhere in the field, the more oil will be recovered, is an attack upon the wisdom of the spacing rule, in that it is predicated on the theory that observance of the spacing provisions of the rule will cause waste and violation of said provisions will prevent waste, and is not substantial evidence on which the Commission can lawfully grant an exception to said rule; and there being no other evidence to support the permit, as shown by the opinion of the Court of Civil Appeals, the mere fact that the Commission granted petitioners a "full hearing" does not relieve said order and the judgments upholding it of the objection that the order granting these two wells is arbitrary, denying petitioners equal protection of law and depriving them of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

On the question of whether there was any substantial evidence before the Commission supporting its order granting permit, the holding by the Court of Civil Appeals that the subdivision of the 2½ acres from the 41 acres must be disregarded in administering the rule and the admission by Turnbow's witnesses that the 41 acres as a whole is reasonably protected from drainage and has a slight advantage over the adjacent leases, without the Turnbow wells, eliminates any possibility of sustaining the permit under the exception clause "to prevent confiscation of property," as has been demonstrated on page 24 of the Petition for Writ of Certiorari. The Court of Civil Appeals did not attempt to sustain the permit on that ground of exception, but sustained it under the exception clause "to prevent waste" on the opinion testimony of Hudnall and Griffin that the wells will prevent waste by increasing recovery under the "more wells, more oil" theory.

Whether the order of the Commission granting the permit was supported by substantial evidence introduced at the hearing before the Commission, depends on whether there was substantial evidence before it that these wells are "necessary to prevent waste" **within the meaning of the spacing rule.** And, in view of the undisputed evidence at the hearings before the Commission and on the trial that there are no peculiar conditions in the reservoir in this vicinity distinguishing it from the field generally, but that the local reservoir conditions equal or surpass the average field conditions, the question is reduced to simple form: **Is the personal opinion of Turnbow's witnesses, admittedly based on the theory that the more wells you drill anywhere in the field**

and the closer they are spaced the more oil will be recovered, and that the enforcement of the minimum spacing provisions in the rule, therefore, cause waste in their general application, substantial evidence in a proceeding under the rule for an exception, sufficient in law to support an order granting a permit in exception to the spacing rule which the Commission adopted and keeps in effect for general application to the field?

The holding of the Court of Civil Appeals that this character of testimony was substantial evidence justifying the order granting the exception was a conclusion of law, for the legal effect of evidence is a question of law. **Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 187.** There was no material dispute on the basic facts. The testimony of Turnbow's witnesses at the hearings before the Commission and the testimony of petitioners' witnesses on the trial was not contradictory on basic facts. All agreed that the conditions in the reservoir affecting ability of the wells to drain oil from around them are equal to or better than the average conditions prevailing in the field. The contradiction between petitioners' and respondents' witnesses is in the conclusion or opinion that is to be drawn from those facts. Petitioners' witnesses were of the opinion that the spacing of Turnbow's wells in violation of the 330-660 foot minimum spacing provisions of the Commission's rule, and the close grouping of wells and uneven spacing and uneven withdrawal of oil that will be brought about by offsetting Turnbow's wells, will lessen the ultimate recovery of oil and thus cause waste. Respondents' witnesses, on the other hand, were of the opinion that

the observance of the minimum spacing provisions of the Commission's rule for this field will cause waste anywhere in the field, and that violation of such provisions will prevent waste, on the "more wells, more oil" theory. These theories are direct opposites. Advocates of the "more wells, more oil" theory say all applications for permits should be granted **as exceptions** to the rule, and thus the exception would become the entire rule. But the Railroad Commission has chosen to keep the spacing rule in effect.

Petitioners have contended throughout this case that, the local reservoir conditions not being exceptional, rendering the field rule less applicable to this area than to the field generally, the opinion testimony of Turnbow's witnesses was not substantial evidence supporting the permit under the "waste" exception to the spacing rule, because it "resolves itself into an attack upon the validity of Rule 37, although under the guise of an application for a permit under an exception to the rule," and that such testimony was incompetent **in this proceeding under the rule,** as was unanimously held by the same Court of Civil Appeals in **Railroad Commission vs. Marathon Oil Company, 89 S. W. (2d) 517, 518 (writ of error refused)** and other cases cited on pages 25 and 26 of the Petition for Writ of Certiorari. As reasoned in **Stanolind Oil & Gas Co. vs. Midas Oil Co., et al., 123 S. W. (2d) 911, 915 (writ dismissed),** "if an exception be necessary to prevent waste, the necessary implication is that facts exist which make inapplicable the general spacing rule."

Since respondents' contention that this character of opinion testimony is substantial evidence support-

ing an exception to the spacing rule is the sole basis for their argument that petitioners are not denied equal protection of law and deprived of their property without due process of law, we desire to present in further detail the reasons why such opinion testimony is not "substantial evidence," and to show that the existence of such testimony at the hearings before the Commission did not relieve the courts of the duty of determining the Federal questions raised in this case.

The sole statutory authority for the Railroad Commission's well spacing rule is Articles 6014 and 6029, Ver. Tex. Stats. 1936, which empower the Commission to adopt rules to prevent waste. **Stanolind Oil & Gas Co. vs. Midas Oil Co., et al., 123 S. W. (2d) 911, 915 (writ of error dismissed).** In adopting this spacing rule prohibiting drilling of wells at lesser distances than 660 feet from other wells and 330 feet from property lines, with provisions for exceptions where necessary to prevent waste or to prevent confiscation of property, the Railroad Commission **expressly found** that said general rule is necessary to prevent waste of oil and gas in the East Texas Field. (See extensive findings to this effect in its orders of September 2, 1931, and February 25, 1932, R. 220-1, 222-5, introduced at R. 46-47, referred to in the Midas case, supra, 123 S. W. (2d) at 915).

In **Sun Oil Company v. Railroad Commission, 68 S. W. (2d) 609, 612** (affirmed 84 S. W. (2d) 447), this same Court of Civil Appeals held:

> "After a full hearing the Railroad Commission determined, and amended its rule 37 accordingly, that wells should be spaced 660 feet apart in that field in order to prevent waste; i. e., one well to

approximately 10 acres of land. According to their own rule, therefore, promulgated after an extensive hearing, wells in closer proximity producing equally would tend to create waste."

* * * *

"The Commission is the duly constituted agency of the state to ascertain what constitutes waste of oil and gas. This it must do after hearings and a careful investigation with reference thereto. And when it has promulgated a general rule, a power expressly delegated to it, after a full and careful consideration of the subject to which such rule relates, as amended rule 37 was, it cannot thereafter even itself arbitrarily grant exceptions thereto which would in effect indubitably destroy the efficacy of the rule itself."

This same Court of Civil Appeals held in **Atlantic Oil Production Company vs. Railroad Commission, et al., 85 S. W. (2d) 655, 657 (writ dismissed):**

"It has been judicially determined by this court that the 660-330 feet spacing rule (37) in the East Texas field, 'promulgated after an extensive hearing,' was in effect an authoritative official finding by the commission that 'wells in closer proximity producing equally would tend to create waste.' Sun Oil Co. v. Railroad Commission (Tex. Civ. App.) 68 S. W. (2d) 609, affirmed (Tex. Com. App.) 84 S. W. (2d) 447.

"The commission cannot arbitrarily grant exceptions to the rules it promulgates under its delegated powers."

There are divergent views on the matter of obtaining the greatest ultimate recovery from the field,

as is demonstrated by the record in this case. Before adopting field rules the Commission held a hearing to determine what rules were necessary to be adopted to prevent waste. Presumably the divergent theories of well spacing were there presented. The Commission adopted the view that a restriction on well spacing, tending to achieve both wide spacing and even distribution of wells, would yield the greatest recovery and prevent the most waste. It incorporated such view in its spacing rule for this field. All of the oil can never be recovered from any field. It is a question of attempting to develop fields in the manner which will yield the greatest possible recovery. From the fact that it has adopted one of the several conflicting theories advanced by geologists and petroleum engineers, it follows that "prevention of waste" has a different concept or meaning, depending upon whose theory is being advanced. A well which one geologist thinks will prevent waste, will, according to the opinion of someone holding a different theory, cause waste instead of preventing waste. Therefore, "prevention of waste," within the meaning of Rule 37 as adopted by the Commission, will differ from the conception of that term possessed by a geologist who thinks that spacing rules are improper and unwise, and that wells drilled in violation of Rule 37 will prevent waste. The geologists and engineers who contend that wells drilled in violation of the general spacing provisions of the rule will prevent waste under the theory of "more wells, more oil," interpret this exception clause as meaning that every well applied for should be granted by the Commission, and that the Commission has the right and duty to grant a permit for each and every well applied for, regardless

of how spaced; and that each permit granted should be sustained on the ground that it is "necessary to prevent waste." The fallacy of this reasoning lies in the fact that they interpret "necessary to prevent waste" according to their own concept of the proper spacing pattern, instead of in the light of the general rule itself. When properly interpreted, in the light of the general rule, this clause does not authorize the granting of each and every well applied for, but only authorizes the closer spacing of wells in those portions of the field where there exist peculiar conditions restricting the migratory ability of the oil and gas below the migratory ability thereof obtaining generally in the field. **Stanolind Oil & Gas Co. v. Midas Oil Co., supra.** When thus construed, both the general rule and the exception clause are reasonable, valid and consistent. The general provisions of the rule import a finding by the Commission that wells closer than 660 feet apart are not necessary to prevent waste in the portions of the field where the usual underground conditions exist, but will cause waste, and that in the portions of the field where unusual conditions exist abnormally restricting the migratory ability of the oil and gas, closer spacing of wells may be permitted upon a showing of such peculiar conditions.

This court has before it the unusual spectacle of the Railroad Commission granting a permit for an exception on opinion testimony, to the effect that the more wells you drill and the closer they are spaced anywhere in the field, the more oil will be recovered, regardless of whether the locations comply with the minimum spacing provisions of its field rule, and regardless of whether exceptional reservoir conditions exist in the vicinity, which is in substance that

observance of the rule in all instances tends to cause waste, and that violation of the rule in all instances tends to prevent waste. The situation is rendered more bizarre by the fact that the Commission, in adopting this rule, expressly found that its minimum spacing provisions are necessary to prevent waste, and by the fact that the Commission has no statutory authority either to adopt or continue this rule in effect except on the theory that it is necessary to prevent waste. Because of the obvious inconsistency, we deem it appropriate to review briefly the history of the Railroad Commission's actions and the decisions of the courts with respect to this point, to aid this court in judging (1) whether the protection of petitioners' rights should be left to the final determination of the Commission in this case, and (2) whether testimony of the character relied upon by the respondents is "substantial evidence," which will justify the confiscation of petitioners' property and the denial to them of equal protection of the law.

The first decision by the Supreme Court of Texas in a "Rule 37 case" was that in **Brown, et al., vs. Humble Oil & Refining Company, 83 S. W. (2d) 935,** decided June 12, 1935, in which case said court held invalid a permit order which had been issued by the Railroad Commission and used the following language in its opinion:

> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, right, and just to permit tracts to be subdivided and such

subdivisions drilled after the adoption of the rule; but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." 83 S. W. (2d) 944.

* * * *

"The decisions of the Railroad Commission on this question must be based upon proof, and must not be capricious or unreasonable. The mere holding of a hearing does not justify its action. If after a hearing the commission acts without regard to the evidence, or makes a ruling wholly unsupported by the evidence, it cannot be said to have exercised its discretion. And where it is shown that the commission has abused its discretion, or has acted illegally and issued a permit in violation of its rules, the courts are fully authorized to nullify the permit of the commission and prevent its enforcement. Shupee v. Railroad Commission, 123 Tex. 521, 73 S. W. (2d) 505; 42 Corpus Juris, pp. 691, 692." (83 S. W. (2d) 945).

Between the time the above mentioned opinion was handed down on June 12, 1935, and the time when the Supreme Court overruled Motion for Rehearing on November 27, 1935 (87 S. W. (2d) 1069), the Railroad Commission struck back at this judicial limitation of its authority by a recital in its proration order of August 26, 1935, quoted as follows in **Railroad Commission vs. Marathon Oil Company, 89 S. W. (2d) 517, 519** (opinion dated December 16, 1935):

"It is stated in appellants' brief that the commission, after an extensive hearing, made the following findings on August 26, 1935:

'We further find from the evidence the more wells that are drilled the greater will be the ultimate recovery of oil or gas from any given pool.

'The hearing just closed raises grave doubts as to the wisdom or value of any Rule 37 in preventing waste or in aid of the recovery of oil, except in the instances of certain new fields, and then only as a prevention of fire hazards and blowout dangers'." (89 S. W. (2d) 519)

The quoted statement may be said to imply a threat that the spacing rule would be abolished if there were too much "judicial interference" with its permit orders.

According to the opinion in the Marathon case, just cited the Railroad Commission had granted one Adams permit for a fourth well on a 10 acre tract which had a spacing advantage and a density advantage over the adjacent leases, and the court held that Adams had at least an equal drainage opportunity, that there was no basis for granting an exception to the rule for well No. 4, and that the Commission exceeded its powers in granting the permit (89 S. W. (2d) 517, 518). The Commission in that case sought to sustain its order granting the permit on the theory that the well was necessary in order to prevent waste, referring the Court to the Commission's "finding" above quoted, and employing the same character of testimony and reasoning which the Commission employed in granting the permit to Turnbow, et al.,

in this case. Further quoting from the opinion in the Marathon case:

> "The only theory advanced in support of the Commission's order is embodied in the testimony of the Geologist Hudnall, to the effect that the drilling of the Adams No. 4 would result in the ultimate recovery of a greater proportion of the recoverable oil from the tract. This was based upon the theory that, 'in general with the closer spacing of wells and the more densely the wells are drilled, the higher will be the percentage of recovery in the East Texas oil field.' The effect of his testimony is summed up in the following question to which he gave an unqualified affirmative answer: 'Based upon that theory, Mr. Hudnall, of course the Railroad Commission would have to grant every application that is presented to the Railroad Commission for the drilling of additional wells; if it were the law that an applicant would be entitled to a well every time he could show that if he did not get the permit that there would be some oil left in the ground that he could recover through that well?'" (89 S. W. (2d) 518-19)

(Here followed the quotation from the Commission's order of August 26, 1935)

> "In the last analysis the position of appellant resolves itself into an attack upon the validity of rule 37, although under the guise of an application for a permit as an exception to the rule."
>
> * * * *
>
> "With the wisdom or policy of rule 37 the courts are not concerned. These are issues which address themselves exclusively to the Railroad

Commission, whose action is subject to review by the courts only in a direct proceeding, and then only to determine whether its action has reasonable factual basis for its support. The resolving of divergent conclusions arrived at from conflicting theories and opinions of experts are issues solely within the commission's jurisdiction. See Brown v. Humble Oil & Refining Co. (Tex. Sup.) 83 S. W. (2d) 935, 99 A. L. R. 1107, on rehearing (Tex. Sup.) 87 S. W. (2d) 1069; Danciger Oil & Refining Co. v. Railroad Commission (Tex. Civ. App.) 49 S. W. (2d) 837.

"The commission has the power to modify, amend, or even abrogate the rule (37), whenever, in its judgment, this should be done in the interest of a proper administration of the conservation laws of the state. But until such action, or until the rule is set aside in a direct proceeding instituted for that purpose, it is the imperative duty of the courts to enforce it, notwithstanding any expression of doubt on the part of the commission as to its wisdom, propriety, or effectiveness to accomplish its objective." (89 S. W. (2d) 519)

Thereupon the Court of Civil Appeals affirmed the judgment of the trial court cancelling the order granting permit, and the Commission failed in its attempt to sustain itself by the "more wells, more oil" argument.

The next significant development in the judicial history of this question was the case of **Whittington vs. Lon A. Smith, et al., 16 Fed. Supp. 448**, opinion dated August 18, 1936, in which Whittington attacked the spacing rule itself as unconstitutional. With this attack coming up for trial, the Railroad Commission found itself in the unenviable position of having de-

cared, in effect, by the recitals in its order dated August 26, 1935, that Rule 37 has no foundation in fact in so far as preventing waste is concerned, except in a few fields where there is a danger of blow-outs, inapplicable to the East Texas field. So, with the Whittington case coming up for trial, the Commission entered another general order dated February 4, 1936, containing some more recitations by which the Commission undertook to put itself back into some semblance of good legal position by explaining what it meant by the language in its order of August 26, 1935, and we quote this new order of February 4, 1936, from the opinion in **Magnolia Petroleum Company vs. Railroad Commission, 93 S. W. (2d) 587, 588,** as follows:

> "It may not be amiss in this connection to direct attention to the fact that the commission in its order of February 4, 1936, clarified the views expressed in the quotation in the Marathon Case from its order of August 26, 1935, as follows:
>
> " 'By this language the Commission did not mean and did not find from the evidence that the closer wells are drilled the greater will be the ultimate recovery of oil and gas from any given pool, but by such language only meant and found from the evidence that the more wells that are drilled in conformity with the spacing rules as applicable to the various fields in Texas the greater will be the ultimate recovery of oil and/or gas from any given pool.
>
> " 'It was not then the intention and it is not now the intention of the Railroad Commission to abrogate or abandon any of the spacing rules now in effect and applicable to the various oil

> and gas fields in Texas, nor to militate against the fact basis on which the Commission's spacing rules are based'."

Thus, by this order the Railroad Commission got back on the other side of the fence and contended that the observance of its spacing rule was necessary to prevent waste; and it succeeded in defeating the attack on the validity of the rule in the Whittington case.

The Commission was consistent with its position in the Whittington case in two other cases which involved validity of Commission orders **denying** drilling permits, decided in the interim after the decision in the Marathon case and prior to the decision in the Whittington case. In the first of these cases, **Arkansas Fuel Oil Company, et al. vs. Reprimo Oil Company, 91 S. W. (2d) 381** (writ dismissed), the Commission had denied Reprimo permit to drill a second well on a 5 acre tract, and Reprimo sought to enjoin the Commission from interfering with the drilling of said well. The Railroad Commission successfully contended that its order denying permit should be sustained because the "more wells, more oil" testimony, absent peculiar local conditions in the reservoir, is not substantial evidence justifying a permit, and we quote as follows from the opinion in that case:

> "Appellee's witness gave it as his opinion that the more wells were drilled, the more oil would be recovered; that two on appellee's land would ultimately produce more than one. There are no facts present here of any peculiar local geological structures or other factors which would operate to cause waste if a second well is not drilled and

operated. The above opinion of the witness is perhaps the strongest testimony in this record to sustain the necessity of a second well to prevent waste. No facts are given to support it. It is in precise opposition to the terms of rule 37, requiring the spacing of wells to be 660 feet by 330 feet. Of this it was said by the Austin court: It has been judicially determined by this court that the 660-330 spacing rule (Rule 37) in the East Texas field 'promulgated after an extensive hearing,' was in effect an official authoritative finding by the Commission that 'wells in closer proximity producing equally would tend to create waste.' Sun Oil Co. vs. Railroad Commission (Tex. Civ. App.) 68 S. W. (2d) 609, 612, affirmed Bennett vs. Sun Oil Co. (Tex. Sup.) 84 S. W. (2d) 693." (91 S. W. (2d) 384)

In the second of these cases, **Magnolia Petroleum Company vs. Railroad Commission, 93 S. W. (2d) 587 (writ refused),** decided April 8, 1936, the Railroad Commission had denied Magnolia Petroleum Company permit to drill well No. 10 on an 84.12 acre lease in East Texas, and Magnolia filed suit against the Commission seeking to enjoin it from interfering with Magnolia in the drilling of the well. The well location was 330 feet and 304.8 feet, respectively, from the nearest lines and 256 feet from the nearest well (93 S. W. (2d) 587), and was, therefore farther from adjacent lines and wells than the two Turnbow locations involved in this case. Magnolia contended, among other grounds, that the Commission wrongfully refused the permit because:

"3. The additional well tended to decrease waste, and therefore to conserve the oil in the field in that its effect would be to increase the ultimate recovery from the field."

Regarding the evidence on this point, the opinion states:

> "There was also testimony analogous to that in Railroad Commission v. Marathon Oil Co. (Tex. Civ. App.) 89 S. W. (2d) 517 (error ref.), to the effect that the ultimate recovery from the field would be enhanced by increased density in drilling."

But the Court sustained the Railroad Commission's contention that testimony of that character did not justify the permit to drill the wells in exception to the spacing rule, and sustained the order of the Railroad Commission denying permit.

In the subsequent case of **Stanolind Oil & Gas Co. vs. Midas Oil Co., et al., 123 S. W. (2d) 911,** in which the Railroad Commission was an appellee, Stanolind sought to annul an order of the Commission granting Midas a permit to drill a second well on 2.14 acres of land on the ground that the permit was not necessary to prevent either confiscation or waste, and the Railroad Commission sought to sustain its order granting permit. Quoting from the opinion:

> "The contention is made that the recital above quoted of the order of August 26, 1935, amounts to an official finding by the Commission against the efficacy of the spacing provisions of the rule. Notwithstanding the above quoted recital, however, the Commission has not amended nor modified these spacing provisions of the rule itself; and obviously realizing that such above quoted recitals, taken alone and if considered as an official finding, probably operated to nullify the rule unless the spacings then provided by the

rule were reduced, the Commission in its order of February 4, 1936, in effect repudiated the recital of its order of August 26, 1935, in the following language (See Magnolia Pet. Co. vs. Railroad Com., Tex. Civ. App., 93 S. W. (2d) 587, 588):

"'By this language the Commission did not mean and did not find from the evidence that the closer wells are drilled the greater will be the ultimate recovery of oil and gas from any given pool, but by such language only meant and found from the evidence that the more wells that are drilled in conformity with the spacing rules as applicable to the various fields in Texas the greater will be the ultimate recovery of oil and/or gas from any given pool.

"'It was not then the intention and it is not now the intention of the Railroad Commission to abrogate or abandon any of the spacing rules now in effect and applicable to the various oil and gas fields in Texas, nor to militate against the fact basis on which the Commission's spacing rules are based.'

"The writer interprets the above as a repudiation by the Commission itself of the so-called finding of August 25, 1935, and a reaffirmation of 'the fact basis on which the Commission's spacing rules are based.' This fact basis was recited, in the order of September 2, 1931, as the reason for increasing the spacing distances in the East Texas field from 150-300 to 330-660 feet, to be to prevent 'actual physical waste of oil and gas.' That is the extent of the power vested in the Commission by the Legislature. See Arts. 6014 and 6029, R. C. S., as amended, Vernon's Ann. Civ. St. Arts. 6014 and 6029. **If there be no reasonable relationship, therefore, between the**

> **spacing provisions of the rule and the prevention of waste, such spacings become purely arbitrary,** and the Commission has exceeded its authority in prescribing them. The validity of the rule has been repeatedly upheld. The very term 'exception' thereto necessarily implies a deviation or departure from the general rule. **If an exception be necessary to prevent waste, the necessary implication is that facts exist which make inapplicable the general spacing rule. That is, that underground conditions, e. g., sand thickness, saturation, porosity, permeability, well potentials, bottom hole pressure, and drainage in the area of the particular well, differ from those obtaining generally, and on which the rule itself is predicated.** (Emphasis ours, 123 S. W. (2d) 911, 915)

Thus, in the Midas case, the Railroad Commission was again adhering to the "more wells, more oil" theory, which position, if sustained, would have upheld its permit order under attack in that case.

The history of Rule 37 in the East Texas Field and of the permit litigation involving said rule shows that the Railroad Commission has alternately adhered to and disavowed the "more wells, more oil" theory, depending on which position was best suited to sustaining its particular order under fire in the successive lawsuits; and it has likewise insisted that opinion testimony of the kind here involved is "substantial" or "unsubstantial" depending on whether it was being offered for or against the Commission's position. In the case at bar respondents, including the Railroad Commission, pass over this point with the terse statement that the opinion of Hudnall and Griffin was "substantial evidence," and that petitioners' rights under the Fourteenth Amendment are not violated because the Commission gave them a "full hearing."

They suggest no reason why an exception to the spacing rule is justified in law on the mere private opinion of their witnesses that the spacing rule is unwise, and we submit that no reason for its position is apparent except that the Commission again desires to have its order upheld.

The Railroad Commission is a party to another lawsuit involving its handling of the East Texas Field **(Railroad Commission of Texas, et al., vs. Rowan & Nichols Oil Company, 60 S. Ct. 1021)** now pending in this Court on motion for rehearing, and it is interesting to compare the position being taken by the Commission in that case with its position in this case. In the **Rowan & Nichols case,** according to the Commission's brief therein, Rowan & Nichols Oil Company had a 24.99 acre lease with 5 wells and sought an adjustment of its allowable and in the alternative sought permit to drill 20 additional wells on its lease. The Commission apparently ignored the application for adjustment of allowable, but granted Rowan & Nichols Oil Company a permit to drill only one of the additional wells requested (see pages 6 and 10, Railroad Commission's brief, Rowan & Nichols case). If the Commission believes in the position it now asserts in the Turnbow case, that the more wells drilled and the closer they are spaced, the more oil will be recovered and waste will be thereby prevented, is it not remarkable that the Commission did not grant Rowan & Nichols permit for 20 wells? In its brief in the Rowan & Nichols case, the Railroad Commission further contends, page 47, that the proration order, which is substantially on a per-well basis, does not operate to favor densely drilled tracts, because the Commission undertakes to distribute the

wells on an acreage basis. Quoting from the Commission's brief therein:

> "With reference to the objection that the proration order favors densely drilled tracts, it should be pointed out, first that while the proration order does not expressly take acreage into consideration, the acreage of each lease is considered by the Railroad Commission in its spacing rules, which must be construed together with its proration orders. In other words, the more acreage an operator has, the more wells he may drill, thereby obtaining a larger allowable for his lease." (page 47)
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> * * * *
>
> "The Commission generally has tried to permit each landowner to obtain substantial justice by drilling to substantially the same density as the area surrounding his lease. . . . This is illustrated by the respondent's lease, which at present is about as densely drilled as the surrounding area and the average of the field as a whole, even without drilling its sixth well." (pages 49-50)

If the Commission were actually attempting to distribute the wells between the operators in proportion to their acreage so that each would receive his fair share of the oil under the per-well proration order, why did it grant the 41 acre tract in this case two more wells when it already had a density and allowable per acre advantage over the surrounding area, and why did it grant Turnbow two wells on the 2½ acre portion of the 41 acres, giving him a density of 1.25 acres per well and a daily allowable per acre of 16 barrels (R. 105-6), which is approximately a

4 to 1 advantage over the surrounding area drilled to an average density of more than 5 acres per well and having an average daily allowable per acre of less than 4 barrels? (R. 91-3, 350A, 351) It appears to us that the Railroad Commission has now carried its contentions to the point where it is taking opposite positions before the same court at the same time, and we submit this as an added reason why this court should carefully examine the soundness of the position which the Commission is taking in this case.

We submit that the evidence relied upon by the Commission in granting the permit under the waste exception clause was not substantial, and that the courts below erred in sustaining the permit on the basis of that testimony. Substantial evidence has been defined by Judge Learned Hand as ". . . . the kind of evidence on which responsible persons are accustomed to rely in serious affairs." **N. L. R. B. vs. Remington Rand, Inc., 94 Fed. (2d) 862, 873, Cert. denied, 304 U. S. 576, 58 Sup. Ct. 1046.** The term "substantial evidence" at least implies that the evidence must possess something of substance, must be competent, and such as would appeal to reasonable minds. **Consolidated Edison Co. vs. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 217.** To say that an exception to the field spacing rule should be granted merely because an individual appears before the Commission and expresses the opinion that the rule is unwise and that every well applied for should be granted as an exception to the rule, presents an irrational contradiction on its face. It is an anomalous thing that the Commission, in the exercise of its statutory duty to prevent waste, and having found that the spacing rule is necessary for that purpose, would grant ex-

ceptions to the rule on the basis of testimony to the effect that its spacing rule is unwise, yet leaving the spacing rule in effect and undertaking to enforce it against petitioners and others in the field. This is a contradictory position which does not appeal to reasonable minds. The courts of Texas have repeatedly held this character of testimony is not competent in a proceeding under the rule for an exception to the rule, because it attacks the wisdom of the rule on which the proceeding is based. Surely this cannot be said to be "substantial evidence."

In this connection we call attention to the holding of the Supreme Court of Texas in **Brown vs. Humble Oil & Refining Company, 89 S. W. (2d) 935, 945,** to the effect that in a proceeding to determine rights by virtue of the exceptions contained in the spacing rule, those who receive and hold benefits under the rule are not in position to attack the validity of it.

In **Interstate Commerce Commission vs. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185,** it was contended that the courts could not set aside an order of the Interstate Commerce Commission "even if the finding was wholly without substantial evidence to support it," and this court overruled that contention with the following significant language:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean, that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however

> beneficently exercised in one case could be injuriously exerted in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power." (33 S. Ct. 186)

The Interstate Commerce Commission further insisted that its findings must be presumed to have been supported by information it had gathered in its official capacity, even though not formally proved at the hearings. This court likewise overruled that contention, holding the Commissioners could not act upon their own information, because when the Commission acts in a quasi-judicial capacity, all parties must be fully apprised of the evidence and given an opportunity to cross examine witnesses, inspect documents and offer evidence in explanation or rebuttal, hence that the court will test the sufficiency of the evidence on the basis of that which was introduced at the hearing, and on that point this court stated:

> "In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding." (33 S. Ct. 187-188)

The theory underlying this decision was to protect individuals against arbitrary acts of the administrative body. We submit this same underlying theory supports our contention that an exception to the Railroad Commission's spacing rule for the East Texas Field cannot be sustained, in an area where no exceptional reservoir conditions exist, on opinion testimony

to the effect that observance of the spacing provisions of the rule causes waste, and that violation of the rule prevents waste. For, if a permit is to be sustained on that sort of testimony, the Railroad Commission could proceed to grant permits whenever it chooses to do so, and yet deny permits to others similarly situated, and ask the court to sustain its order in the first situation on the ground that such opinion testimony is substantial, and likewise insist the court should sustain its order denying permit in the second situation on the ground that such evidence is unsubstantial, as it has done in cases cited. Under such circumstances the citizen's protection against arbitrary action of the administrative body is destroyed, and he and his property are subjected to the unbridled will of the administrative body, and the way is left open to the Commission to rule the East Texas Field by administrative fiat. Any permit arbitrarily granted by the Commission would be sustainable on the "more wells, more oil" theory, if such constitutes substantial evidence.

The purpose of the prevailing policy relaxing rules of evidence in proceedings before administrative boards is to abolish form rather than substance. If the order granting the permit in this case is sustainable on opinion testimony that the general rule itself is unwise, we submit that substance also has been abolished.

John Foster Dulles states in his article on "Administrative Law", 25 A.B.A.J. 275, 280:

> "As a practical matter it is only in rare cases that the court review serves any substantial purpose. The potentiality of such review is, of course, enormously valuable as tending to lead commis-

> sions to comply, at least in form and generally in substance, with those basic procedural requirement of 'fair play', which the Supreme Court has several times annunciated, notably in the **Morgan** case (304 U. S. 1, (1938)) . . . . ."

His statement is well illustrated by the case at bar. In the prior suit **(Turnbow, et al. vs. Barnsdall Oil Company, 99 S. W. (2d) 1096)**, the Commission had granted Turnbow a permit for these same wells without bothering to give notice and hearing, and the permit was cancelled on that ground. Thus, the Commission was forced to obey **form.** From the record in this case, it appears that the Commission after having fully complied with form, by giving notice and a "full hearing", has now disregarded **substance** in order again to grant Turnbow the right to continue to operate the wells which the Commission originally permitted **ex parte.**

Petitioners' position in this case does not violate the rule that the courts should not substitute notions of expediency and fairness for those of the Commission. Petitioners merely seek to prevent the Commission from arbitrarily disregarding, in favor of Turnbow, standards which the Commission itself set up, and which standards the Commission at the same time asserts the right to enforce against others similarly situated.

II.

The filing in the Supreme Court of Texas of petitioners' Application for Writ of Error did not admit the cause into the Supreme Court and the refusal thereof does not amount to a determination of the cause on its merits, and the judgment of the Court of

Civil Appeals, which has the record, is the last judgment entered and is that of the highest court of the State in which a decision could be had. Therefore, the petition properly seeks a Writ of Certiorari to be directed to the Court of Civil Appeals.

The question raised by Point Two of Respondents' Brief has been settled against them by a long line of prior decisions of this Court in cases which have come to this Court directly from Courts of Civil Appeals of Texas after the Supreme Court of Texas had refused writ of error, establishing since 1893 as an invariable rule applicable to cases coming from Texas, that in such a situation the writ of certiorari should be directed to the Court of Civil Appeals, or the appeal should be from that court to this court, as the case may be:

Stanley v. Schwalby, 162 U. S. 255;
Bacon v. Texas, 163 U. S. 207;
Roller v. Holly, 176 U. S. 398;
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28;
M. K. & T. Ry. Co. v. Ferris, 179 U. S. 602;
Smith v. St. L. & S. W. Ry. Co., 181 U. S. 248;
Waggoner v. Flack, 188 U. S. 595;
Pardee v. Aldridge, 189 U. S. 429;
Greer County v. Texas, 197 U. S. 235;
H. & T. C. Ry. Co. v. Mayes, 201 U. S. 321;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86;
A. T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55;
Morgan's La. & T. R. & S. S. Co. v. Street, 217 U. S. 599;
M. K. & T. Ry. Co. v. Bailey, 220 U. S. 608;
M. K. & T. Ry. Co. v. Richardson, 220 U. S. 601;
T. & N. O. R. Co. v. Gross, 221 U. S. 417;
T. & N. O. R. Co. v. Miller, 221 U. S. 408;
Gaar, Scott & Co. v. Shannon, 223 U. S. 468;

G. H. & S. A. Ry. Co. v. Crow, 223 U. S. 481;
G. H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481;
T. & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111;
M. K. & T. Ry. Co. v. Harriman, 227 U. S. 657;
G. C. & S. F. Ry. Co. v. McGinnis, 228 U. S. 173;
St. L. S. F. & T. Ry. Co. v. Seale, 229 U. S. 156;
Downman v. Texas, 231 U. S. 353;
Paris & Gt. North. R. Co. v. Boston, 231 U. S. 742;
Pacific Exp. Co. v. Rudman, 234 U. S. 752;
S. A. & A. P. R. Co. v. Waggoner, 241 U. S. 476;
Knights of Pythias vs. Mims, 241 U. S. 574;
M. K. & T. Ry. Co. v. Cassady, 242 U. S. 611;
St. L. S. F. & T. Ry. Co. v. Smith, 243 U. S. 630;
M. K. & T. Ry Co. v. Ward, 244 U. S. 383;
G. C. & S. F. Ry. Co. v. Texas Packing Co., 244 U. S. 31;
G. C. & S. F. Ry. Co. v. Vasbinder, 245 U. S. 635;
M. K. & T. R. Co. v. Texas, 245 U. S. 484;
G. C. & S. F. Ry. Co. v. Texas, 246 U. S. 58;
I. & G. N. R. Co. v. Anderson County, 246 U. S. 424;
York Mfg. Co. v. Colley, 247 U. S. 21;
Southern Pac. Co. v. Berkshire, 254 U. S. 415;
City Nat. Bank v. El Paso & N. E. R. Co., 262 U. S. 695;
Cobb Brick Co. v. Lindsay, 275 U. S. 491;
I-G. N. R. Co. v. R. R. Com., 275 U. S. 503;
M. K. & T. R. Co. v. Texas, 275 U. S. 494;
Danciger & Emerick Oil Co. v. Smith, 276 U. S. 542;
T. & P. R. Co. v. Guidry, 280 U. S. 531;
Barwise, et al, Trustees, v. Sheppard, 299 U. S. 33;
Texas & N. O. R. Co. v. Neill, 301 U. S. 674 (granting certiorari);
United Gas Public Service Co. v. Texas (the

Laredo Gas case), 301 U. S. 667 (overruling motion to dismiss appeal).

Lone Star Gas Co. v. State of Texas, 304 U. S. 224, 58 S. Ct. 883; Memorandum opinion, 58 S. Ct. 748.

In the two cases last cited the same contentions as are now urged by respondents, based on cases coming to this court from Ohio where the state practice is different, were urged by motions to dismiss, and were expressly overruled by this court. In Texas, the cause is admitted to the Supreme Court of Texas only in the instance where writ of error is granted, and under the express provisions of the statute (Art. 1750, Rev. Civ. Stats. of Texas, 1925) the effect of refusal of an application for writ of error is to deny admission of the cause to that court.

The order refusing the application for writ of error does not "appear on the face of the record" to be a judgment of the Supreme Court of Texas on the merits. Said order does not recite a hearing of the cause, but merely a hearing of and refusal of the application for the writ. (R. 368-369). It is the settled rule of this Court that where the court of last resort of the State declines to allow an appeal or writ of error from a lower State court, this Court will not treat such action as an affirmance on the merits of the judgment below except where this plainly appears "on the face of the record . . . in express terms of the judgment or decree sought to be reviewed." **Norfolk & Suburban Turnpike Co. v. Virginia, 225 U. S. 264, 269.** Even had the Supreme Court of Texas stated, as reason for its refusal to review the judgment of the Court of Civil Appeals, that it believed its judgment is correct, it would not "take from the refusal its os-

tensible character of declining jurisdiction." **American Railway Express Co. v. Levee, 263 U. S. 19, 21; Western Union Tel. Co. v. Crovo, 220 U. S. 364, 366.** This Court took jurisdiction of the following cases coming directly from the Courts of Civil Appeals where the Texas Supreme Court had accompanied its order of refusal by an opinion stating its reason for refusing to review the case and showing its concurrence in the views of the court below: **M. K. & T. R. Co. v. Texas, 245 U. S. 484 (same case, 107 Texas 540); G. C. & S. F. Ry. Co. v. Texas, 246 U. S. 58 (same case, 107 Texas 544); M. K. & T. R. Co. v. Cassady, 242 U. S. 611 (same case, 108 Texas 461); T. & N. O. R. Co. v. Neill, 301 U. S. 674 (same case, 128 Texas 580, 100 S. W. (2d) 348).**

The Court of Civil Appeals has the record, and for that reason petitioners have properly requested that the Writ of Certiorari be directed to that court. The record sent to this court is duly certified by the Clerk of the Court of Civil Appeals. Under Art. 1743, Rev. Civ. Stats. of Texas, 1925, when an Application for Writ of Error is filed, the Clerk of the Court of Civil Appeals sends the record to the Supreme Court; and under Rule 4 of the Supreme Court of Texas, after that court's refusal of a Writ of Error has become final, its Clerk returns to the Court of Civil Appeals "the papers which belong to that court" retaining the Petition for Writ of Error. (121 Texas 748). Since the record permanently remains in the Court of Civil Appeals, the writ is properly requested to be directed to that court. **Stanley v. Schwalby, 162 U. S. 255, 269.**

Under the State law an order of the Supreme Court of Texas refusing Writ of Error is not a judgment

disposing of the case on its merits. It is a discretionary denial of "the right to entrance" to the Supreme Court of Texas. **S. A. & A. P. Ry. Co. v. Blair, 108 Texas 434, 439; Gatz v. City of Kerrville, 121 Texas 92.** When the Supreme Court's action in refusing the writ becomes final, certified copies of the order of the court are forwarded to the Court of Civil Appeals and the record is returned; and then the clerk of that court is empowered to issue the mandate of that court to enforce its judgment. (Article 1864; Rule 66, of the Courts of Civil Appeals, 102 Texas xxxvi.) The mandate of the Supreme Court will issue, not to enforce its orders refusing writs of error, but only its final judgments. (Article 1773, Rev. Civ. Stats 1925.)

WHEREFORE, petitioners pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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